Supreme Court, U. S
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-4021

PHILIP ALBERGO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

PHILIP ALBERGO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Philip Albergo, Petitioner, prays that a Writ of Certiorari issue to Review the Judgment of the United States Court of Appeals for the Second Circuit, entered in this case on June 17, 1976.

OPINION BELOW

The opinion of the Court of Appeals below (Appendix, *infra* page) is reported in -F.2d-

JURISDICTION

The Judgment of the Court Below was entered on June 17, 1976. Rehearing was denied on August 18, 1976. The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was deprived of a fair trial when the Trial Judge, in a perjury case, admitted into evidence testimony relevant solely to the issue of materiality, a question of law, where this testimony was highly prejudicial to petitioner and minimally probative in light of other evidence already introduced on this issue notwithstanding the Court's attempt to abate the prejudice via charge to the jury.

2. Whether petitioner was deprived of a trial by impartial jury when his conviction is based on the introduction of tape recorded conversations in which one of the speakers allegedly was petitioner and the Trial Judge failed to instruct the jury that determination of whether or not petitioner's voice was one of the recorded voices was an issue for them to determine.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution.

2. The Sixth Amendment to the United States Constitution.

3. The statute under which petitioner was prosecuted,

though nothing turns on its terms, was 18 U.S.C. Section 1623(a), which provides as follows:

> "Section 1623. *False Declarations Before Grand Jury or Court*
>
> "(a) Whoever under oath in any proceeding before or ancillary to any Court or Grand Jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000.00 or imprisoned not more than five years or both."

STATEMENT

A. Course of proceedings in the case now before this Court.

On June 11, 1975, in a case then pending in the United States District Court for the Eastern District of New York entitled *United States of America v. Philip Albergo*, 74 CR 819, Petitioner was found guilty by a jury on an indictment of one count charging a violation of 18 U.S.C. Section 1623 (a).

On July 25, 1975, the District Court entered judgment and petitioner was sentenced to two years imprisonment. This judgment and sentence was affirmed by the Court of Appeals for the Second Circuit, *United States of America v. Philip Albergo*, No. 1013 ——F.2d.—— (1976). Rehearing was denied by the Court of Appeals on August 18, 1976.

B. Relevant facts concerning the underlying conviction for perjury.

On April 1, 1974, petitioner testified before a Grand Jury which was investigating the theft of airline tickets from interstate commerce. Petitioner testified, *inter alia* about his acquaintanceship with Larry Alfano and Mike Augendiso. He denied knowing "anybody else, anybody at all who's gotten airline tickets from Larry or from Mike", and he asserted that he knew nothing about airline tickets.

At the trial the respondent's entire proof of the alleged perjury was based on intercepted taped telephone conversations. The District Court, over vigorous objections by defense counsel, admitted into evidence FBI Agent Rigolizzo's hearsay testimony to the effect that in the course of his investigation he had learned of the theft of some 7,000 blank airline tickets, at least some of which had later passed through the Cross Roads Bar and were connected with Mike Augendiso and Larry Alfano, the latter being the manager of the bar. This testimony was not relevant to any issue properly before the jury and its admission before the jury in the circumstances of this case was highly prejudicial to the defendant. Its effect was to paint the defendant as an associate of known traffickers in stolen airline tickets, since he had made his telephone calls from the Cross Roads Bar and had admitted to the Grand Jury that he had met Mike Augendiso there and had accompanied Larry Alfano to Augendiso's house.

This testimony was purportedly offered only to show that the evidence sought to be elicited from the defendant was material to the Grand Jury's inquiry, despite the fact that the District Court had ruled that the issue of materiality was a question of law and that the testimony of petitioner

before the Grand Jury was, as a matter of law, material to the Grand Jury's investigation.

In an attempt to prove that petitioner knew people who obtained airline tickets from Larry or Mike and that petitioner knew about "airline" tickets, the Government relied solely on tape recordings of telephone conversations which contained references to "tickets", to "Larry" and to "Mikie". The respondent contended that the unidentified male voice recorded on the tapes was that of petitioner. The respondent called one witness who claimed to identify the voice on the tapes as that of the petitioner, based on hearing these tapes approximately 500 times but having overheard petitioner's voice in person on only one brief occasion, while petitioner conversed with others in a bar. Petitioner vigorously contested this identification and requested the District Court to charge the jury on the question of voice identification.

REASONS FOR GRANTING THE WRIT

1. Petitioner's right to a fair trial was abridged by the admission, into evidence, of Agent Rigolizzo's hearsay testimony. The probative value of this evidence was nil since it was not relevant to any issue properly before the jury and was highly prejudicial. The testimony was offered only on the issue of materiality, despite the fact that materiality is not a jury issue, but is a question of law, which was resolved by the Court. Moreover, materiality was not disputed at the trial and ample evidence with regard to this matter was already introduced, to wit, the transcript of petitioner's Grand Jury testimony which revealed, at the outset, that the Grand Jury was investigating stolen airline tickets. Had additional evidence been deemed necessary,

the Grand Jury Foreman or the Assistant United States Attorney who examined petitioner before the Grand Jury could have been called as witnesses to explain the nature of the Grand Jury investigation. *See United States v. Alu,* 246 F 2d 29, 33 (2d Cir. 1957); *United States v. Moran,* 194 F. 2d 623, 624, (2d Cir. 1957). This would have caused no undue prejudice to petitioner. The primary effect of Agent Rigolizzo's testimony was, according to Judge Mansfield's dissent in the case at bar, "to paint the defendant as an associate of known traffickers in stolen airline tickets. . . ." (——F.2d at ——).

The Trial Judge's instruction to the jury was not sufficient to overcome this irrelevant highly prejudicial hearsay testimony. The ineffectiveness of limiting instructions with regard to protecting defendants from the effects of incompetent, prejudicial evidence was recognized by this Court in *Bruton v. United States,* 391 V.S. 123 (1968) and *Jackson v. Denno,* 378 U.S. 368. In his dissenting opinion in the case at bar, Judge Mansfield pointed out that "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States,* 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.,* 167, F.2d 541aN——F.2d at ——*quoting Krulewitch v. United States,* 336 U.S. 440, 453 (1949) (Justice Jackson Concurring)." In evaluating the potential effectiveness of such a limiting instruction, the Court, in *United States v. Brown,* 490 F. 2d 758 (D.C. Cir. 1973) observed that "The single most important consideration may be whether the (evidence) if used by the jury for its improper purpose, is virtually dispositive of the case and extremely damaging to the position taken by the opponent of the admission of evidence". (*Id.* at 764).

In the case at bar, Agent Rigolizzo's testimony used improperly by the jury, was extremely damaging to petitioner and the admission of same deprived him of a fair trial. The limiting instructions given by the Trial Judge were not sufficient to protect petitioner's rights.

2. It is elementary that trial judges are bound to instruct the jury as to what factual issues are to be resolved by them. It is not proper for a Court to rely on a jury's ability to infer, on their own, the law and the nature of their duties. *United States v. DiDonato,* 301 F. 2d 383, 385 (2d Cir. 1962). In *Casella v. United States,* 449 F. 2d 277, 283 (3d Cir. 1971), the Court recognized that a charge which withdraws, from the jury, consideration of an essential element of the crime charged constitutes a violation of a defendant's right, under the Sixth Amendment, to a trial by jury.

In the case at bar, the Trial Judge's charge, was phrased in such a manner that the jury would tend to assume that the Trial Judge had already determined that the male voice recorded on the tapes of the intercepted telephone conversations was that of the petitioner. Therefore, for all intents and purposes, the entire question of voice identification was removed from the jury's consideration. In addition, although the Trial Judge recognized that the weight to be given to the testimony identifying the voices on the tapes, was a question for the jury, and despite the fact that petitioner expressly requested an instruction on this issue, the Trial Judge failed to give any charge whatsoever on this critical issue. Since the respondent's entire proof was based on the tapes of intercepted telephone conversations, and by failing to give any instructions whatsoever on the issue of voice identification, the jury was deprived of its right to pass on a vital and crucial issue of fact, and the District Court abridged petitioner's Sixth Amendment right to a jury trial.

CONCLUSION

Petitioner's right to a fair jury trial was abridged by failure to give the jury a required instruction on voice identification and in effect, depriving the jury of its right to pass on this vital issue of fact involving tapes of intercepted telephone conversations which constituted the respondent's entire proof. The petitioner's right to a fair trial and due process of law, was also violated by permitting the jury to hear irrelevant hearsay testimony which was highly prejudicial to the petitioner, and which had no probative value. Petitioner respectfully requests this Court to grant a writ of certiorari.

Respectfully submitted,

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APPENDIX A
JUDGMENT OF CONVICTION BY DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

PHILIP ALBERGO

Defendant.

DOCKET No. 74 CR819

In the presence of the attorney for the government the defendant appeared in person on this date: July 25, 1975

* * *

There being a finding verdict of Guilty, Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C. Sec. 1623 (a) in that on or about February 21, 1974, the defendant having duly taken an oath that he would testify before a competent tribunal in a case in which a law of the U.S. authorizes an oath to be administered, to wit, a Federal Grand Jury of the U.S., duly impaneled, and then and there inquiring for that District into violations of federal law, unlawfully, wilfully and knowingly, and

contrary to said oath, did state material matters which he did not believe to be true.

* * *

Sentence: 2 years execution of sentence stayed to 7-29-75 at 12 Noon.

s/ Orin J. Judd

Dated July 25, 1975

APPENDIX B

BRIEF FILED BY ALBERGO IN SECOND CIRCUIT COURT OF APPEALS

75-1279

United States Court of Appeals For the Second Circuit

UNITED STATES OF AMERICA,

Appellee.

-against-

PHILIP ALBERGO,

Defendant-Appellant.

On Appeal From The United States District Court For the Eastern District of New York

Appellant's Brief

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

PHILIP ALBERGO,

Defendant-Appellant,

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York, rendered on or about July 25, 1975, after trial by jury, convicting the Appellant of a single count of perjury (18 U.S.C., Section 1623 (a)) and sentencing him to a period of two years incarceration. (Hon. Orrin G. Judd at trial and sentence). The Appellant is presently at liberty on a five thousand dollar ($5,000.00) surety bond.

QUESTIONS PRESENTED

1. Did the court below err in allowing the prosecution to present to the jury impermissable inferences, hearsay declarations and other irrelevant and highly prejudicial testimony of criminal acts allegedly committed by others than the defendant, so as to deny to the Appellant his right to a fair trial?

2. a. Did the court below err in failing to hold a preliminary hearing, and in allowing the prosecution to present to the jury inadequate and highly suggestive testimony identifying the Appellant as the male voice on the taped telephone conversations, which constituted the basis of the Government's entire case?

b. Did the court below err in failing and refusing to give the jury any instructions whatsoever as to the identification of Appellant's voice on the intercepted tapes?

STATEMENT OF FACTS

On July 23, 1973, a Special Grand Jury was impaneled by Hon. Jacob Mischler, to investigate the theft of airline tickets from interstate commerce. The Appellant, Philip Albergo, appeared as a witness before this Grand Jury on April 1, 1974. Based upon a portion of Appellant's testimony before this Grand Jury, he was charged, by indictment dated December 26, 1974, with violating Section 1623(a) of Title 18, U.S.C., to wit: While under oath as a witness before the Special Grand Jury, he wilfully, knowingly, and contrary to said oath, testified falsely before said Grand Jury with respect to material matters. Appellant is alleged to have knowingly given false answers to questions posed to him as follows:

"Q. Do you know anybody else, anybody at all who's gotten airline tickets from Larry or from Mike?
A. No, sir. I know nothing about airline tickets.
Q. You know nothing?
A. No.
Q. No question in your mind?
A. No nothing."

To prove the falsity of Appellant's testimony before the Grand Jury, the Government relied on tapes of four telephone conversations intercepted at the Cross Roads Bar.

After trial, the jury returned a verdict of guilty on June 11, 1975. Sentence was pronounced and a judgment of conviction was rendered on July 25, 1975.

THE EVIDENCE AT TRIAL

The prosecution's theory was, in essence, that Albergo, when questioned by the Grand Jury, had knowledge of stolen airline tickets. The Government contended that the Appellant deliberately lied and refused to cooperate with the investigation in order to shield one Larry Alfano and Mike Augendiso, who were alleged to have been connected with airline ticket thefts through the testimony of F.B.I. agent Rigolizzo. The government's theory rested solely upon inferences to be drawn from circumstantial evidence.

a) *PAUL WALLIG*

The prosecution's first witness was Paul Wallig, an employee of the Civil Aeronautics Board. Mr. Wallig's testimony was offered for the purpose of establishing that the round trip air fare between New York and Miami was $171.00 during the summer of 1973 (T27-28). On cross examination, Mr. Wallig testified that $171.00 was not the

only possible price for round trip air transportation between New York and Miami. There were night-coach fares, military fares and fares for charter air transportation, none of which amounted to $171.00. Mr. Wallig also stated that there probably were other destinations within the United States for which $171.00 would represent the round trip air fare from New York (T30-34).

b) *TRANSCRIPT OF GRAND JURY TESTIMONY*

The government then read into evidence the transcript of Mr. Albergo's testimony before the Grand Jury. This was preceded by stipulations to the effect that the Grand Jury was impaneled for the purpose of investigating the theft of airline tickets from interstate commerce; that Philip Albergo was called as a witness before the Grand Jury and duly sworn by M.G. Wasserman, the Grand Jury Forman; and that the stenographer would, if called as a witness, testify that the transcript of Albergo's Grand Jury testimony was a true and accurate reproduction of his testimony, with the punctuation being that of the stenographer (T38-39).

The transcript read into evidence revealed the purpose of the Grand Jury investigation. Mr. Paul Sherrin, who conducted the Grand Jury examination for the government, explained to Mr. Albergo that the Grand Jury was investigating stolen airline tickets (T52). The witness was then questioned at length about his relationship with Larry Alfano. The transcript demonstrates that Albergo had been acquainted with Alfano for three years, that Alfano was manager of the Cross Roads Bar in Queens, New York, and that Alfano had invested some money in a pizza shop being built by Albergo (T55-60, 65-67). It was also established that Albergo frequently patronized the Cross Roads Bar which was across the street from a pizza store that Albergo was constructing (T55-56).

During the course of the Grand Jury examination, Albergo was also questioned about two men named "Mike". The transcript indicates that Albergo did not respond to a question as to whether he knew a Mike Glorio and the examiner did not pursue the matter. (T72). As to Mike Augendiso, Albergo testified to having met him at the Cross Roads Bar and on one occasion he accompanied Alfano to Augendiso's house (T57). The purpose of this visit was a discussion between Augendiso and Alfano regarding the catering of a party at the Cross Roads Bar (T57-60).

Albergo also testified before the Grand Jury that a girl, known to him as Loraine, occasionally phoned him at the Cross Roads Bar (T72-74). He also stated that neither he, nor any member of his family, had ever flown before (T61-62); that he had never purchased airline tickets for anyone (T64); that he did not know of "anybody else, anybody at all, who got airline tickets from Larry or Mike" (T74); and that he knew nothing about airline tickets (T74-75).

c) *AGENT MICHAEL RIGOLIZZO*

The next trial witness for the prosecution was Michael Rigolizzo, an agent for the Federal Bureau of Investigation. His entire testimony was received over repeated objections interposed by defense counsel before, during and after his testimony (T86-102). Agent Rigolizzo testified that he investigated six thefts of airline tickets from interstate shipments (T92-93). Out of a total of seven thousand stolen airline tickets, approximately two thousand were recovered (T95). The first time that he went to the Cross Roads Bar was in December of 1973 or January 1974, six months *after* the intercepted telephone conversations (T101). He further testified that some of the stolen tickets "originated" from the Cross Roads Bar (T93-

94) and that as a result of his investigation, he was able to "connect" stolen airline tickets to Mike Augendiso (T94-95) and Larry Alfano (T95).

d) *TAPES OF INTERCEPTED PHONE CONVERSATIONS*

The Government then introduced into evidence, and played for the jury, tapes of four telephone conversations recorded from wiretaps placed on telephones at the Cross Roads Bar (T98). The conversations were all between a male, speaking from a phone in the bar, and a female identified as Loraine Zencorich. A stipulation that the tape recordings, were accurate reproductions of the intercepted phone conversations, had already been entered on the record (T39).

Before each tape was played at the trial, transcripts of the recorded conversations (prepared by the Prosecutor), were distributed to the jurors in order to assist them in listening to the tapes. Each transcript bore, at the top, a legend identifying the female voice as that of "Loraine Zencorich" and the male voice as "Philip Albergo."

The four taped telephone conversations contained conversations about "tickets" and various prices including $171.00 were mentioned. Reference was made in the conversations to a "Larry" and a "Mickie". When a problem arose with regard to the price of the tickets, the female voice (identified as Loraine Zencorich), was told that "Larry" would have to "find out about" it because the male speaker "(didn't) know too much about" it. The Government contends that during one of the taped conversations, the word "Miami" was allegedly uttered by the male. This was during a side conversation between the male speaker and another unknown male in the bar. Much of this side conversation was inaudible (and the Govern-

ment's transcripts so specify). At no time did the conversations specifically refer to airline tickets, stolen airline tickets or any flight to Miami. Neither "Larry" nor "Mickie" were identified by their last names or in any other way. As a matter of fact, in none of the tapes was the word "airlines" ever used either by the male or the female voice and the male voice never identified himself on the tapes nor did the female voice ever identify him. ("Mickie" was also identified as a female on the tapes.)

e) *LOIS REICHMAN*

Before the tapes were played, the prosecution called Lois Reichman, who testified that she heard the tapes and that the female voice was that of her secretary, Loraine Zencorich (T103-104), but she never met the Appellant, Albergo (T105).

f) *POLICE OFFICERS COYNE AND PAULSON*

New York City Police Officers Robert Coyne and Francis C. Paulson, were called to identify the voices of Loraine Zencorich and Philip Albergo, respectively. Before these witnesses testified, defense counsel requested that the Court make a preliminary determination as to the suggestiveness involved in the identifications of the voices by conducting a voir dire, out of the hearing of the jury (T109-110). This request was denied by the Court (T110).

Officer Coyne, who was in the courtroom while the tapes were played, testified that he recognized the female voice as that of Loraine Zencorich (T111). His identification of her voice was based on one conversation with her for three to four minutes while he was serving a subpoena on her (T111).

Officer Paulson, who was also in the courtroom while the tapes were played, testified that the male voice was that of

Philip Albergo (T113), but he only heard Albergo speak on *one* prior occasion, at the Cross Roads Bar (T113).

The circumstances under which Officer Paulson heard Albergo's voice *in person* were then explored further on cross-examination. Officer Paulson admitted that he never spoke with Albergo; he had merely overheard a conversation between Albergo and other persons at the Cross Roads Bar (T115, 119-120). There were other people in the bar conversing "fairly close" to Officer Paulson, while he was attempting to overhear Albergo speak (T116). This one and only time that the witness overheard Albergo's voice at the bar, occurred towards the end of 1973 or the beginning of 1974 (T120). The taped phone conversations took place on various dates between June 15 to June 28, 1973. When Officer Paulson was asked whether he knew that on or about May 29, 1973, Albergo had surgery performed on his throat and vocal chords, and his voice was altogether different for about eight weeks, the witness testified that he knew that Albergo had been in the hospital for an operation (T123). Officer Paulson admitted that he had received instructions to appear in Court for the sole purpose of making a voice identification (T125, 131).

THE VERDICT

After deliberation, the jury returned a verdict of guilty as charged on June 11, 1975.

POST-VERDICT MOTION FOR A JUDGMENT OF ACQUITTAL OR FOR A NEW TRIAL

Defendant-Appellant's post verdict motions for dismissal of the indictment; setting aside of the jury's verdict; and entry of Judgment of Acquittal, or in the alternative, for a new trial, were denied on July 25, 1975.

THE SENTENCE

On July 25, 1975, Judge Orrin G. Judd imposed upon the Appellant a sentence of two years incarceration.

POINT I

THE APPELLANT FAILED TO RECEIVE A FAIR AND IMPARTIAL TRIAL BECAUSE OF THE ADMISSION OF IMMATERIAL AND HIGHLY PREJUDICIAL TESTIMONY.

THE IMPROPER EVIDENCE

The Government called as its chief witness, F.B.I. Agent Michael Rigolizzo. Prior to Agent Rigolizzo taking the stand, Defense Counsel objected, without avail, to the proposed testimony of the F.B.I. Agent (T86 to 90). The testimony of Agent Rigolizzo was ostensibly offered and received for the purpose of revealing 1) the nature of the investigation conducted by the Grand Jury and 2) to demonstrate that inquiries by the Grand Jury into matters connected with the Cross Roads Bar were material to the investigation (T13, 221). Agent Rigolizzo testified that he investigated six different thefts totalling 7,000 airline tickets (T92-95) and that approximately 2,000 stolen tickets were recovered, some of which " . . . originated from the Cross Roads Bar . . . " (T93-94). Over objection of Defense Counsel the Government then went on to elicit further testimony to the effect that stolen tickets were "connected" with Larry Alfano (T95) and Mike Augendiso (T94-95).

It is axiomatic that even relevant evidence should be excluded where its probative value is substantially out-

weighed by the danger of undue prejudice to the party against whom it is offered, or by the danger that the evidence will confuse or mislead the jury and focus their attention on collateral issues. *United States v. Brown,* 490 F. 2d 758 (D.C. Cir. 1973); *United States v. Byrd,* 352 F. 2d 570 (2d Cir. 1965); *Lyda v. United States,* 321 F. 2d 788 (9th Cir. 1963); J. Weinstein (United States District Judge E.D.N.Y.) *Weinstein's Evidence,* Section 403; *Wigmore Evidence,* Section 1904 (3rd Edition); Rule 403; *Wigmore Evidence,* Section 1904 (3rd Edition); Rule 403 of the Federal Rules of Evidence (which became effective shortly after Appellant was tried).

In the case at bar, the testimony of Agent Rigolizzo focused the jury's attention on collateral issues, to wit, that Larry Alfano and Mike Augendiso were "connected" with stolen airline tickets, without any evidence that the Appellant knew of such connection. This caused substantial prejudice to the Appellant because the Government built a major portion of its case on the acquaintanceship between the Appellant and Larry Alfano and Mike Augendiso (T187-189, 194-195). The prosecution's theory was that Appellant denied knowledge about airline tickets before the Grand Jury with the deliberate intent to shield Larry Alfano and Mike Augendiso from the investigation (T188, 195). The nature of the prejudicial effects of this testimony will be discussed in greater detail *infra.*

The probative value of Agent Rigolizzo's testimony on the issues of 1) materiality and 2) the nature of the Grand Jury investigation, was extremely minimal. Prior to Rigolizzo's testimony the prosecutor had already read to the trial jury a stipulation conceding that the Grand Jury was impaneled "to investigate the theft of airline tickets, which had been stolen from interstate shipment." (T38). In addition, the transcript of Appellant's testimony before the

Grand Jury, was read into evidence. The transcript clearly revealed that the Grand Jury examiner informed Albergo, at the very outset, that the Grand Jury was "conducting an investigation concerning, but not limited to, stolen airline tickets". (T52). Furthermore, the Court determined the materiality of Albergo's Grand Jury testimony as a matter of law and charged the trial jury accordingly (T216). But even if the Court deemed it necessary to admit additional evidence on the nature of the investigation, it could have been accomplished in a manner which would not have caused undue prejudice to the Appellant.

The Government could have called the Grand Jury Forman, or the Assistant U.S. Attorney, who examined Appellant before the Grand Jury. *See United States v. Alu,* 246 F. 2d 29, 33 (2d Cir. 1957) (United States Attorney who conducted portions of a Grand Jury investigation is competent to testify to the subject matter of that investigation); *United States v. Moran,* 194 F.2d 623, 624, (2d Cir. 1957) (Counsel for senate subcommittee before which perjury was committed may testify to the scope of the committee's authority to investigate). It should be noted that Defense Counsel did and would certainly have stipulated to such testimony; as a matter of fact, the Grand Jury transcript (T51, 52) and the stipulation refered to *supra* (*see,* T38) covered precisely this type of evidence.

There was absolutely no legitimate need for the highly prejudicial testimony that Larry Alfano and Mike Augendiso were "connected" with stolen airline tickets. It is apparent, that the real purpose for which Agent Rigolizzo's testimony was offered, was to raise inferences that Larry Alfano and Mike Augendiso dealt with stolen airline tickets and that these dealings had to be known to Albergo since they all frequented the same Bar. These inferences were essential links to the smokescreen created

by the prosecutor; in order to make it appear, without evidence, that Appellant appeared before the Grand Jury with the intent to shield Mike and Larry, particularly the latter (T187-189, 194-195, 206-208). Furthermore it was intended to prejudice the trial jury against Appellant on the basis of "guilt by association".

Throughout the trial, Defense Counsel objected to this "guilt by association" hearsay evidence on the ground that any possible probative value was substantially outweighed by the dangers of undue prejudice and the focus upon collateral issues. *See Generally Lyda v. United States,* 321 F. 2d 788 (9 Cir. 1963); *United States v. Tomaiolo,* 249 F. 2d 683 (2d Cir. 1957). In fact, the Court finally agreed with Defense Counsel's contention that the jury ought not be permitted to infer, from Agent Rigolizzo's testimony, that Larry was guilty of dealing with stolen airline tickets or that Appellant, solely by virtue of his acquaintanceship with Larry, was aware of these dealings (T208-209). The Court instructed the jury that the testimony of Agent Rigolizzo has a bearing on materiality but that they could not "infer that Mr. Alfano had stolen tickets, nor that Mr. Albergo knew Mr. Alfano had stolen tickets". (T221). The prosecutor did not object to the Court's granting of Defense Counsel's request for such a charge (T208-09), nor did the prosecutor except to the charge as given (T230).

The Government was quite careful to describe for the jury the nature and extent of Appellant's relationship with Larry Alfano. The Grand Jury minutes went into great detail on this matter (T55-60, 65-67) as did the prosecutor's summation (T187-189, 194-195). During summation, the prosecutor twice stated to the jury his theory that Appellant deliberately lied to the Grand Jury in order to shield Larry Alfano from its investigation (T188, 195). During the course of the argument on Defense Counsel's Motion for

mistrial, the Court recognized that a factual issue had been raised with regard to "whether (Albergo) was trying to shield people who were being accused of dealing in stolen airline tickets" (T207).

It is thus evident that the testimony of Agent Rigolizzo was offered primarily, for the improper purpose of raising an inference that Larry Alfano had stolen tickets and that Appellant knew that Larry Alfano possessed these stolen tickets. The testimony about Larry and Mike was at best, minimally probative of the nature of the Grand Jury testimony (neither of which issue was disputed and both of which had been clearly established by other means) and the prosecutor clearly presented to the Jury his theory that Appellant intended, while testifying before the Grand Jury, to shield Larry Alfano from the investigation. In the light of the foregoing, it cannot plausibly be claimed that the jury considered the testimony concerning Larry and Mike solely on the issues of materiality and the nature of the investigation. Indeed, the jury must have considered this testimony primarily, if not solely for the improper purpose of inferring that Appellant knew that Larry Alfano was connected with stolen airline tickets and therefore was involved with him. *See United States v. Brown,* 490 F. 2d 758 (D.C. Cir. 1973);

> "There thus appears to be no legally relevant purpose for the introduction of this evidence other than for the clearly improper inference it supports."

490 F. 2d at 781.

PREJUDICE TO THE APPELLANT

An examination of all proper inferences that could be raised from the properly admitted evidence, viewed most favorably to the Government, compels the conclusion that

the prosecution failed to establish a prima facie case that perjury had been committed.[1]

The evidence, if viewed most favorably to the Government with every reasonable inference, would justify a jury in inferring the following. (1) Appellant spoke over the phone with Loraine Zencorich with regard to tickets costing $171.00. (2) Someone mentioned the word "Miami". (3) $171.00 is one of several different air fares to Miami from New York and that Miami is only one of many places that one could fly to, from New York, for $171.00. (4) Appellant was acquainted with Larry Alfano, Mike Glorio and Mike Augendiso. (5) Persons identified only as "Larry" and "Mike" were mentioned in the phone conversations in connection with the (unidentified) tickets. (6) Some stolen airline tickets originated from the Cross Road Bar (however, Agent Rigolizzo did not go to the Cross Roads Bar until six months after the taped telephone conversations).

It is apparent, that absent the testimony of Agent Rigolizzo, the record is devoid of any evidence from which a reasonable juror could infer that Larry or Mike were in any way involved with airline tickets or, that the Appellant *knew* of any connection that Larry or Mike might have had with stolen airline tickets. Of even greater significance is the complete absence of any proper evidence from which a reasonable juror could infer that any false statements that might have been made by the Appellant before the Grand Jury were "knowingly" made (18 U.S.C. Section 1623(a)).

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1. Assuming, arguendo, that the tape recordings of the telephone conversations should not have been excluded, as will be pointed out in POINT II *infra*.

Thus the Government failed to prove one of the essential elements of perjury.

The Appellant testified before the Grand Jury approximately eight months after the alleged telephone conversations took place (T153-155). The Grand Jury examiner did nothing to focus Appellant's attention to the telephone conversations or even to refer to the time period when these conversations were held, or to aid Appellant in refreshing his memory (T153, 175-176). This was in contrast to the treatment of the Government's witnesses at the trial, some of whom gave occasionally inaccurate testimony because of forgetfulness, or were mistaken in answering questions posed to them (T35, 118). The trial witnesses were permitted to refresh their recollection in any manner deemed necessary (T149-150, 153-154). The Government introduced no evidence which could raise an inference that these four short telephone conversations dealt with anything more than an isolated occurrence in Appellant's life (T181-182). In fact, during one of the recorded conversations the male speaker (allegedly the Appellant) stated that he didn't know anything about handling tickets (T172). The Appellant would have no reason to remember a few isolated telephone conversations, even if tickets were discussed, and therefore Appellant could not be guilty of perjury in testifying before the Grand Jury that he knew nothing about airline tickets. *See Fotie v. United States* 137 F. 2d 831 (8 Cir. 1943) (A perjury conviction requires proof of something more than the occurrence in fact, of an event not remembered).

The questions the Appellant was asked before the Grand Jury were ambiguous and imprecise. The examiner made no attempt to specifically pin the Appellant down to the matters relating to the recorded telephone conversations. (T152-153, 160). *See Bronston v. United States*, 409 U.S.

352, 362 (1973) ("Precise questioning is imperative as a predicate for the offense of perjury"); *United States v. Wall*, 371 F. 2d 398 (6th Cir. 1967); *Galanos v. United States*, 49 F. 2d 898, 899 (6th Cir. 1931) ("Perhaps if he had been asked specifically, he would have answered truly."); *United States v. Sweig*, 316 F. Supp. 1148 (S.D.N.Y. 1970) *aff* 441 F. 2d 114.

The indictment herein contains an answer given by the Appellant to the Grand Jury, where Appellant stated: "I know nothing about airline tickets". It is unrealistic to assume that every word uttered should be construed literally. Indeed, Courts have often recognized that a word or phrase often has several different meanings and language must often be interpreted with reference to the background of the speaker and the context in which the words are uttered. *See Generally United States v. Vasin*, 221 F. 2d 1 (7th Cir. 1955); *United States v. Rose*, 215 F. 2d 617 (3d Cir. 1954); *Brumel Handkerchief Corp. v. Cluett, Peabody & Co.*, 127 F. 2d 318 (Ct Customs & Patents App. 1942); *Woods v. Western Holding Corp.* 77 F. Supp. 90 (W.D. Mo., W.D. 1948) *aff* 173 F. 2d 655. The Appellant's answer "I know nothing about airline tickets" must be construed in the light of Appellant's Grand Jury testimony that he never flew or handled airline tickets. Not knowing anything about "stolen" airline tickets the Appellant would not have been likely to recall the eight month old phone conversations in response to the questions posed to him, especially since these conversations were never called to his attention. The words "I know nothing about airline tickets" was not responsive to the preceding question, to wit, whether Appellant knew *anybody else*, anybody at all, *who had gotten* airline tickets from Larry or from Mike. *See United States v. Cobert*, 227 F. Supp. 915 (S.D. Cal. 1964).

Since there was no competent evidence introduced at the trial which could properly impute, to Appellant, knowledge of any connection between Larry Alfano and stolen airline tickets, thus a reasonable juror could not infer that Appellant intended to shield Larry Alfano from the Grand Jury investigation. How can one infer that Appellant had intent to protect Larry Alfano when there is no competent evidence that Appellant knew of any wrong doing by Alfano, or that Alfano needed to be shielded from the Grand Jury? The prosecution thus failed to prove, by competent evidence, a material element of the crime of perjury, to wit, a "knowing" falsehood.

It is thus clear that in finding the Appellant guilty, the jury improperly and contrary to the Court's instructions, used Agent Rigolizzo's testimony to infer that Alfano had stolen airline tickets and that Albergo *knew* that Alfano had stolen tickets. Although the Court properly instructed the jury that they could not make such use of the evidence, (T221), apparently this was not sufficient to protect the Appellant from the highly prejudicial effects of the "guilt by association" evidence, and there was no basis for admitting this evidence in the first place. In evaluating the potential effectiveness of such a limiting instruction, the Court in *United States v. Brown* 490 2d 758 (D.C. Cir. 1973) stated:

> "While the degree of prejudice depends on a number of factors, perhaps the single most important consideration may be whether the statement, if used by the jury for its improper purpose, is virtually dispositive of the case and extremely damaging to the position taken by the opponent of the admission of evidence."

490 F. 2d at 764 (footnotes omitted). The fact that limiting instructions may be insufficient to protect a defendant

from the effects of incompetent, highly prejudicial evidence which was exposed to the jury was recognized in *Bruton v. United States* 391 U.S. 123 (1968) and *Jackson v. Denno.* 378 U.S. 368 (1963).

Appellant thus contends that the Court below committed reversible error by admitting Agent Rigolizzo's testimony about Larry Alfano and Mike Augendiso, or at the very least, for failing to affirmatively and clearly instruct the jury to disregard this testimony.

POINT II

TESTIMONY IDENTIFYING THE MALE VOICE WAS IMPROPERLY ADMITTED INTO EVIDENCE AND THE COURT FAILED TO CHARGE THE JURY ON VOICE IDENTIFICATION.

A. The foundation for the testimony identifying the male voice on the tapes was insufficient as a matter of law and therefore should not have been admitted into evidence.

The Court below should not have admitted officer Paulson's testimony identifying the male voice on the tape recordings of the four telephone conversations intercepted at the Cross Roads Bar. (T113) The Government failed, as a matter of law, to satisfactorily establish that Officer Paulson had a proper basis for comparing Appellant's voice with the male voice appearing on the tapes. (T115-116, 119-120).

The general rule is that testimony identifying a voice, whether heard on the telephone or on recording devices, is admissible only if it is first established that the witness has

a basis for comparing the voice to be identified on tape with the voice of the alleged speaker. *See Generally* Annot. 70 A.L.R. 2d 995. This basis for comparison is usually established by having the witness testify to face conversations between himself and the alleged speaker. *See United States v. Borrone-Iglar.* 468 F. 2d 419 (2d Cir. 1972); *United States v. Valdes.* 417 F. 2d 335 (2d Cir. 1969); *Espinoza v. United States.* 317 F. 2d 275 (9th Cir. 1963); *United States v. Glass.* 277 F. 2d 566 (7th Cir. 1960); *United States v. McCartney.* 264 F. 2d 628 (7th Cir. 1959); *United States v. Washington.* 253 F. 2d 913 (7th Cir. 1958); *United States v. Moia.* 251 F. 2d 255 (2d Cir. 1958).

Indeed such a face to face conversation was precisely the foundation used by the Government in the instant case with regard to the identification of the voice of Loraine Zenorich. Officer Coyne testified that he engaged Loraine in a direct conversation for three to four minutes while serving her with a subpoena (T111). But even here, the Government deemed it necessary to corroborate this face to face identification by having Loraine's employer also identify the recorded voice (T103-104).

By way of contrast, the identification of the *male* voice recorded on the tapes was frivolous and tainted. On direct examination Officer Paulson testified that the male voice on the tapes was that of Appellant and that he heard Appellant speak on only *one* occasion. This differed substantially from the Zencorich voice identification, in that the Government failed to corroborate the police officer's testimony with more reliable evidence from a person truly familiar with Appellant's voice. The Government also failed to establish, on direct examination, the circumstances under which the witness allegedly heard

Appellant speak. The reason for the latter omission became apparent upon cross-examination.

Cross-examination of Officer Paulson established that, he never engaged Appellant in a face to face conversation. He had merely overheard Appellant speaking with others in the Cross Roads Bar, at a time when other bar patrons were also conversing in close proximity to Officer Paulson (T115-116, 119-120). Paulson claimed that he heard on tape the same voice about 500 times before he was sent to identify the Appellant in person. This indicates that when he went into the bar, Officer Paulson was already quite sure that the voice he was about to hear was the same as the one pointed out to him on the tapes. It should be noted that the tapes were records of telephone conversations intercepted at the Cross Roads Bar where numerous people use the telephone (T119).

It is respectfully submitted that Officer Paulson's in-Court identification of Appellant's voice was inadmissible because of the Government's failure, as a matter of law, to properly establish that Officer Paulson had a bona fide basis for comparing the actual voice of the Appellant with the one on the tapes. Similar contentions were twice accepted by the New York State Courts. *See People v. Abelson*, 309 N.Y. 643, 132 N.E. 2d 884, (1956); *People v. Sher*, 8 Misc. 2d 359, 167 N.Y.S. 2d 748 (Sp. Sess. 1957). In each case the witness' basis for comparing the voice to be identified with that of the alleged speaker was so weak that the in-Court identifications offered by the prosecution were inadmissible as a matter of law. In *People v. Sher*, a police officer who did not know the defendant, and had no prior interest in his activities, was not permitted, as a matter of law, to identify Appellant's voice in Court, notwithstanding that he subsequently engaged defendant in a face to face conversation.

B. The voice identification should not have been admitted into evidence because same was made under circumstances which were so suggestive as to deprive Appellant of due process; this determination should have been made by the Court after a preliminary hearing outside of the presence of the jury.

The circumstances under which Officer Paulson identified Appellant's voice were "so impermissibly suggestive as to give rise to a substantial likelihood of misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968). Since the Court below allowed the jury to consider the unduly suggestive identification in arriving at a guilty verdict, Appellant's right to due process was abridged and reversible error was committed. *Stovall v. Denno*, 388 U.S. 293 (1967).

These principles have been held by the United States Supreme Court, to apply to a wide variety of identification procedures. In *Coleman v. Alabama*, 399 U.S. 1 (1970) a lineup was found to be unduly suggestive where the witness already identified one of the defendants prior to his participating in the formal lineup. (Note, however, that here, the in-court identification was admissible because same was found to be based on sources independent of the tainted lineup).

In *Neil v. Biggers*, 409 U.S. 188 (1972), a rape victim identified defendant at a showup staged in the police station. This was done only after the police tried, unsuccessfully to find other persons fitting defendant's physical description for a lineup. At the time of the crime, the victim had ample opportunity to observe the defendant. In holding that the out-of-court identification was admissible at trial, the Supreme Court stated as follows:

> "Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification'. *Simmons vs. United States*, 390 U.S. at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification with the deletion of 'irreparable' it serves equally well as a standard of the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones condemned for the further reason that the increased chance of misidentification is gratuitous."

409 U.S. at 198. The *Neil* Court also took notice of the fact that the ability of law enforcement officials to arrange less suggestive identification procedures had emerged as one of the circumstances to be considered by a Court in determining whether or not a denial of due process occurred.

In *Foster v. California*, 394 U.S. 440 (1969), the witness was able to identify defendant in a lineup. However, prior to this time, the witness was unable to identify defendant at an earlier, suggestive, lineup and was subsequently able to muster only a tentative identification at a showup. In holding this identification to be violative of due process, the Court observed:

> "The suggestive elements of this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact 'the man'. In effect, the police repeatedly said to the witness, '*This* is the man . . .' This

> procedure so undermined the reliability of the eyewitness identification as to violate due process."

394 U.S. at 443 (emphasis is in original, citations omitted).

In *Palmer v. Peyton*, 359 F. 2d 199 (4th Cir. 1966), the witness identified defendant's voice at the police station. Prior to this time, the witness was informed that the police had a negro suspect in custody and had been showing the suspect's shirt, which she recognized as similar to the one worn by her assailant. Moreover, the procedure utilized was entirely different from the course followed the prior evening, when the witness viewed a lineup. Defendant's voice was the only voice the witness was permitted to hear. In holding this identification procedure to have been violative of due process, the Court stated:

> "When she was asked if she could identify the voice, the only voice that was submitted for identification, the highly suggestive atmosphere that had been generated could not have failed to affect her judgment.
>
> Any identification process, of course, involves danger that the recipient may be influenced by prior formed attitudes; indeed we are all too familiar with instances in which supposedly 'irrefutable' identifications were later shown to have been incorrect. *Where the witness bases the identification on only part of the suspect's total personality, such as* height alone, or eyes alone, or voice alone, prior suggestions will have most fertile soil in which to grow to conviction. This is especially so when the identifier is presented with no alternative choices; there is then a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect."

359 F. 2d at 201 (Emphasis added).

The circumstances surrounding Officer Paulson's identification are not meaningfully distinguishable from

the facts in *Foster v. California* and *Palmer v. Peyton supra.* Prevalent in the cited cases and the instant case is an identification made by a witness which was not truly based on the witness' sincere belief in its accuracy but which was instead tainted by extrinsic suggestion and influenced by the prior formed attitudes.

Officer Paulson's opportunity to listen to Appellant's *live* voice was limited to one occasion when he merely overheard Appellant conversing with others in a bar, at a time when other patrons were speaking nearby (T115-116, 119-120). This identification was based on only a portion of Appellant's total personality, to wit, voice. Officer Paulson was sent to the Cross Roads Bar to identify only the voice of the Appellant. Yet the telephone in the bar was used by many people (T119). But, Officer Paulson claims that he frequented the Cross Roads Bar in 1972, 1973 and 1974. Yet, he never ran into Larry Alfano (manager of the Bar), Mike Laury and Mike Augendiso all of whom frequented the bar, and apparently he never bothered to listen to any of the voices belonging to others frequenting the bar.

Had the Government taken this matter seriously, there were many less suggestive methods available for identification of the recorded voice. Another police officer could have engaged the Appellant in actual conversation and then attempt to identify this voice by listening to the tapes. The police officer surely could have taken the time to listen to voices of other patrons in the bar to see if their voices were similar to those appearing on the tapes in question. It is clear that the Government chose the most prejudicial and suggestive procedure available to identify the voice on the tapes, resulting in a denial of due process.

Appellant respectfully submits that the Court below erred in failing to conduct the requested preliminary

hearings (T109-110); in failing to determine that the identification was made under circumstances which were so suggestive as to deprive Appellant of due process; and in permitting Officer Paulson to testify to the tainted identification. In *Jackson v. Denno,* 378 U.S. 368 (1963)—reversible error occurred by allowing the jury to consider the tainted evidence. In the instant case the Court, not only admitted the voice identification without a preliminary hearing, but then refused to give the jury any instructions concerning the voice identification.

> *C. At the very least, the jury should have been charged that they must determine the identity of the voices on the tapes and that they could disregard the voice identification testimony, if they found that it was made under circumstances which were unduly suggestive.*

Although Appellant submitted to the Court below a requested jury charge to the effect that Officer Paulson's testimony should be disregarded if same was found to have been unduly suggestive, no such instruction was given. As a matter of fact no charge of any kind was given to the jury on the question of voice identification. Cautionary instructions should be given when a significant portion of the Government's case rests on testimony possessing substantial possibilities of unreliability. *See Tillery v. United States,* 411 F. 2d 644 (5th Cir. 1969) (Government's case rested primarily upon uncorroborated testimony of defendant's co-conspirator):

> "The warning (to the jury) is not an absolute necessity in all cases. However, as Judge Learned Hand indicated in *United States v. Becker,* 2 Cir. 1933, 62 F. 2d 1007, the failure to give the warning in close cases, '* * * may turn the scale'."

Id. at 647. As to the rules with regard to undue suggestibility, the Court below failed "to charge the correct law expressly and thereby relie(d) upon the jury's ability to infer it." (*United States v. DiDonato*, 301 F. 2d 383, 385 (2d Cir. 1962)).

The Court below failed to charge the jury as to voice identification, despite the request to do so (T232-233). As a matter of fact the Court's charge was phrased in such a manner that the jury would have to assume that the male voice on the intercepted telephone conversations, was that of the Appellant and the entire question of voice identification was thereby removed from the jury's consideration. (T217, 220).

The following excerpt from the trial record clearly indicates that the Court was fully aware of the fact that the identity of the male voice was a major issue to be determined by the jury:

> "The Court: You're not admitting that Mr. Albergo's voice is on those tapes?
>
> Mr. Meissner: That's right, your Honor." (T50-51).

It is respectfully submitted that the Court's failure and refusal to charge the jury as to the identification of the male voice on the tapes was reversible error, since the Government's entire case depends on the tapes, which could not be considered by the jury without first determining the identity of the male voice.

CONCLUSION

For all the foregoing reasons, the judgment appealed from must be reversed and the indictment dismissed. Alternatively, the case should be remanded for a new trial.

Dated: Brooklyn, New York
March 31, 1976

Respectfully submitted,

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APPENDIX C
OPINION OF SECOND CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1013—September Term, 1975.

(Argued May 13, 1976 Decided June 17, 1976.)

Docket No. 75-1279

UNITED STATES OF AMERICA,

Appellee.

v.

PHILIP ALBERGO,

Defendant-Appellant.

BEFORE:

SMITH, MANSFIELD and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge*, following a jury verdict convicting defendant of a single count of perjury in violation of 18 U.S.C. § 1623(a).

Affirmed.

GEORGE S. MEISSNER, Brooklyn, N.Y., *for Defendant-Appellant.*

STANLEY A. TEITLER, New York, N.Y., Assistant U.S. Attorney (David G. Trager, U.S. Attorney for the Eastern District of New York, of counsel), *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

This is an appeal from a judgment following a jury verdict in the United States District Court for the Eastern District of New York convicting defendant of perjury before a grand jury. 18 U.S.C. § 1623(a). We affirm.

In the Spring of 1973, Michael Rigolizzo, an agent of the FBI, began an investigation into the theft of approximately seven thousand airline tickets. His efforts uncovered a possible connection between the stolen tickets and Larry Alfano, manager of the Cross Roads Bar in Queens, New York, and an associate of his, Mike Augendiso. As a result of agent Rigolizzo's investigation, a special grand jury was impanelled; and appellant was one of approximately 500 witnesses called to testify.

At the outset of his testimony, appellant was informed as to the nature and scope of the investigation into stolen airline tickets. He was then questioned regarding his relationship with Larry Alfano and Mike Augendiso and admitted a personal and business relationship with Alfano and an acquaintanceship with Augendiso. He also testified in response to inquiry, that he knew a girl named Loraine and had talked with her on the telephone at the Cross Roads Bar.

When the questioning turned to the subject of airline tickets, appellant's affirmative answers ceased. He denied ever having taken an airline trip or having purchased or received airline tickets and said he didn't even know what they looked like. He stated that he had never talked to a "Larry" or "Mike" about airline tickets and that he knew nobody who had gotten tickets from Larry or Mike. Appel-

lant's indictment was based on this latter testimony, which is set forth in full in the margin.[1]

At the trial which commenced before Judge Judd on June 9, 1975, appellant's grand jury testimony was introduced into evidence, following which the prosecution called Agent Rigolizzo to the stand. Rigolizzo testified, over vigorous defense objection, that he had been engaged for some time in the investigation of stolen airline tickets; that he had recovered approximately two thousand of the seven thousand tickets reported stolen; that some of the stolen tickets had been traced to the Cross Roads Bar, and that he had been able to connect certain of these tickets to Larry Alfano and Mike Augendiso.

Following this testimony, the Government introduced into evidence four telephone conversations recorded from wiretaps placed on telephones at the Cross Roads Bar. They were all between a male speaking from a telephone in the Bar and a female subsequently identified as Loraine Zencorich. In the first recording, there are vague references to a trip to Miami and to July 28 as a departure date for someone named Marsha. There is also an apparently facetious suggestion by Loraine that the male with whom she was talking get her a ticket to Australia.

In the second conversation, the male asks if a figure of $340 is correct and receives an affirmative response. He then states, ". . . we get 'em like, say like half price," so "that would be one hundred and seventy dollars . . . for

1 Q. Do you know anybody else, anybody at all who's gotten airline tickets from Larry or from Mike?
A. No, Sir. I know nothing about airline tickets.
Q. You know nothing?
A. No.
Q. No question in your mind?
A. No nothing.

two." [2] The male then refers to a cut on the deal by someone named "Mikie" and states that he's delivering "them" tonight.

In the third conversation, the male advises Loraine that he has her tickets and that their actual cost is $171 each.

In the final conversation, Loraine calls the Bar and asks for "Philip". Within seconds, the male voice which appeared on the three previous tapes is heard. For the first time, there is mention of "Larry" when the male tells Loraine that Larry says they had been charged too much for the tickets.

After the introduction of these tapes, Officer Paulsen of the New York City Police Department was called as a witness and identified appellant as the male speaker.[3] As a foundation for this identification, Paulsen testified that he had heard appellant's voice on tape some 500 different times and that he had on one occasion visited the Cross Roads Bar and listened to appellant talking with a group of men at the Bar.

Asserted error in connection with the testimony of Agent Rigolizzo and Officer Paulsen forms the basis of appellant's appeal. Appellant contends that Rigolizzo's testimony was irrelevant and prejudicial; that the testimony of Paulsen was insufficient to support his voice identification, and that the manner in which such identification was made was unduly suggestive and therefore violative of due process.

Agent Rigolizzo's Testimony

While conceding the need for the Government to establish that his allegedly false statements were material to

2 The Government established that the round trip air fare between New York and Miami for two persons was $342.

3 The taps on the Cross Road's Bar telephones were placed by the New York Police Department as part of a separate investigation.

the investigation being conducted by the grand jury, *see United States* v. *Moran*, 194 F.2d 623 (2d Cir.), *cert. denied*, 343 U.S. 965 (1952), appellant contends that such materiality could have been proven with evidence less prejudicial than the testimony of Rigolizzo. He suggests, for example, that the grand jury foreman could have been called as a witness. *See e.g., United States* v. *Alu*, 246 F.2d 29 (2d Cir. 1957). He also suggests that Rigolizzo's testimony was offered primarily for the improper purpose of raising an inference that Larry Alfano had stolen tickets and that appellant knew this to be so.

Judge Judd very carefully instructed the jury, however, that no such inferences could be drawn. He said:

> The fact that there might have been some stolen airline tickets, that was the subject of the investigation and that's been referred to. That is not grounds for convicting this defendant on a perjury charge. He [the appellant] is not charged with possession of stolen tickets or with aiding in the possession of stolen tickets. The testimony by Mr. Rigolizzo with respect to the fact that he had traced some of the stolen tickets to the Cross Roads Bar, has a bearing on the materiality of the question and on the importance of the finding out as much as could be learned about dealings in the Cross Roads Bar. But it does not permit you to infer that Mr. Alfano had stolen tickets, nor that Mr. Albergo knew Mr. Alfano had stolen tickets.[4]

The balancing of relevance against prejudice is primarily for the trial judge; and, without a showing of abuse, his exercise of discretion will not be overturned. *United*

4 Judge Judd also instructed the jury:

> Mr. Alfano is not on trial for stealing airline tickets, nobody is on trial for possession of airline tickets. The caution [sic—question] is simply whether Mr. Albergo gave full and truthful answers.

States v. *Chapin*, 515 F.2d 1274, 1284 (D. C. Cir. 1975), *cert. denied*, —— U.S. ——, 44 U.S.L.W. 3344 (December 12, 1975). Agent Rigolizzo's testimony was not only material to an understanding of what took place before the grand jury; it was also relevant to an understanding of the taped conversations introduced during the trial. If, as appellant contends, the trial jury would have been fully aware of the scope of the grand jury investigation without this testimony, it could hardly be considered prejudicial. Indeed, there was virtually nothing in the testimony that was not easily inferred from the grand jury minutes. When, as part of an investigation into stolen airline tickets a witness is asked whether he knows "who's gotten airline tickets from Larry or from Mike", one would have to be extremely naive not to assume that Larry and Mike were connected in some way with the theft. In view of the careful manner in which Judge Judd circumscribed the use of Rigolizzo's testimony, we see no prejudicial error in its admission.

Officer Paulsen's Testimony

In his challenge to Officer Paulsen's testimony, appellant takes somewhat inconsistent positions. He argues, on the one hand, that identification of his voice required a "face to face" conversation with him, apparently finding no hint of undue suggestion in such individual confrontation. On the other hand, he contends that when Officer Paulsen identified his voice from among six men talking together at the Cross Roads Bar, this procedure was unduly suggestive. We find no merit in either argument.

A telephone conversation is admissible in evidence if the identity of the speaker is satisfactorily established. *United States* v. *Biondo*, 483 F.2d 635 (8th Cir. 1973), *cert. denied*, 415 U.S. 947 (1974), and the question is for

the jury if, as reasonable men, they could find the claimed identification to be accurate. *United States* v. *Alper*, 449 F.2d 1223, 1229 (2d Cir. 1971), *cert. denied*, 405 U.S. 988 (1972). Identification may be based upon a subsequent acquaintanceship with the speaker. *United States* v. *Borrone-Iglar*, 468 F.2d 419 (2d Cir. 1972) (per curiam), *cert. denied*, 410 U.S. 927 (1973). Indeed, it may be adequate, although the persons involved have never personally met. *United States* v. *Chiarizio*, 525 F.2d 289 (2d Cir. 1975). Impossibility of error is not a prerequisite to the admissibility of evidence. *United States* v. *Wilkes*, 451 F.2d 938, 939 (2d Cir. 1971); *United States* v. *Easterday*, 57 F.2d 165, 167 (2d Cir.), *cert. denied*, 286 U.S. 564 (1932). Where, as here, the identifying officer had listened to appellant's voice in over 500 taped conversations, his testimony was sufficient to permit the jury, as responsible men, to identify appellant as the "Philip" who participated in the four conversations at issue.

In his argument based on suggestiveness, appellant attempts to analogize Paulsen's voice identification to the lineup identification of participants in crimes. This argument is misplaced. Appellant was being tried for perjurious grand jury testimony, not for illegal telephone conversations. Moreover, the requirements for voice authentication do not differ markedly from those for document authentication. Once a prima facie case of authorship is made out by the proponent of the evidence, the testimony is admissible; and the reliability of the identification is for the jury. *Carbo* v. *United States*, 314 F.2d 718, 743 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). The "due process" procedure urged by appellant would, if generally applied, make a mockery of Rule 901 of the new Federal Rules of Evidence which requires only that the opinion of the witness be "based upon hearing the

voice at any time under circumstances connecting it with the alleged speaker". Without deciding whether there might be some conceivable circumstances in which appellant's due process contentions would have merit, we hold that they have none here.

Appellant argues, almost in passing, that the questions posed to him by the grand jury were ambiguous. This argument may be as summarily disposed of. To a person predisposed to answer truthfully, the questions were clear. *See United States* v. *Bonacorsa*, 528 F.2d 1218 (2d Cir. 1976).

The judgment is affirmed.

MANSFIELD, *Circuit Judge* (Dissenting):

Although I concur in most of my brother Van Graafeiland's thoughtful opinion, I must respectfully dissent from that part which deals with the district court's admission into evidence of FBI Agent Rigolizzo's hearsay testimony to the effect that in the course of his investigation he had learned of the theft of some 7,000 blank airline tickets, at least some of which had later passed through the Cross Roads Bar and were connected with Mike Augendiso and Larry Alfano, the latter being the manager of the bar. This testimony was not relevant to any issue properly before the jury and its admission before the jury in the circumstances of this case was highly prejudicial to the defendant. Its effect was to paint the defendant as an associate of known traffickers in stolen airline tickets, since he had made his telephone calls from the Cross Roads Bar and had admitted to the grand jury that he had met Mike Augendiso there and had accompanied Larry Alfano to Augendiso's house.

This testimony was purportedly offered only to show that the evidence sought to be elicited from the defendant was material to the grand jury's inquiry, but the contention that it was properly admitted on this basis simply cannot be sustained. The materiality of the subject concerning which a defendant is alleged to have perjured himself is a question of law for the court, not a question for the jury. *Sinclair* v. *United States*, 279 U.S. 263, 298-99 (1929); *United States* v. *Marchisio*, 344 F.2d 653, 665 (2d Cir. 1965). Since there was no need for the jury to hear the prejudicial evidence, the proper course was for the judge to excuse the jury, receive the testimony out of the jury's presence, and make his ruling on materiality. See *United States* v. *Whitted*, 454 F.2d 642, 646-47 (8th Cir. 1972); *Harrell* v. *United States*, 220 F.2d 516, 520 (5th Cir. 1955) (dictum).[1] Indeed the test of materiality—whether a false answer might tend to influence, impede or dissuade the grand jury in its investigation—is fixed at such a low level that only a minimal amount of proof need be presented to the court to establish materiality: a showing from the grand jury minutes or a statement from the prosecutor that the grand jury was investigating the matter under inquiry would suffice in most cases.

Allowing the jury in this case to hear the testimony could not be deemed harmless error. Without Rigolizzo's testimony the jury might have had serious doubts about whether the defendant Albergo was referring to airline tickets, stolen or otherwise, in his taped phone conversations from the bar, since neither he nor the other party

1 *United States* v. *Moran*, 194 F.2d 623 (2d Cir.), *cert. denied*, 343 U.S. 965 (1952), on which the government relies in arguing that the jury might hear this evidence, does not support that position. *Moran* rejected the argument that the court alone should have heard evidence bearing only on materiality solely on the ground that the point had not been properly raised below in the case. *Id.* at 626. Here a proper objection was made.

to these conversations (Loraine Zencorich) ever referred to airline tickets, much less to stolen ones. But on the basis of Rigolizzo's hearsay testimony to the effect that defendant's admitted friends, Larry and Mike, one of whom was the owner of the bar from which Albergo was telephoning, had been "connected with" the stolen tickets, some of which had been recovered from Larry, the trial jury would have an understandable tendency to assume that because the defendant's friends were said to be trafficking in stolen tickets, Albergo must have been conducting sales of those tickets in his telephone conversations, and had therefore lied to the grand jury when he testified that he knew nothing about airline tickets "gotten . . . from Larry and Mike." In short the tendency of this testimony was to convict Albergo through guilt by association.

Even if we assume *arguendo* that Rigolizzo's testimony might properly be admissible for a limited purpose, it is doubtful that its probative value would outweigh this prejudice to the defendant, see Fed.R.Ev. 403, or that the latter could be cured by an instruction, buried amidst other charges, to the effect that the testimony did not permit the jury to infer participation by the defendant in the handling of stolen tickets. But where, as here, the testimony was wholly irrelevant to those issues properly before the jury, and thus entirely unnecessary, it was clearly erroneous to admit it at all. Under such circumstances, the error could hardly be remedied by such an instruction, which might be countenanced in other instances. "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal* v. *United States*, 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore* v. *Baltimore & Ohio R. Co.*, 167 F.2d 54." *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (Justice Jackson concurring).

I must also emphatically disagree with the majority's statement to the effect that one could assume from the prosecutor's questioning of the defendant regarding whether he knew "who's gotten airline tickets from Larry and Mike" that "Larry and Mike were connected in some way with the theft." This assumption violates basic evidentiary principles. On the contrary, trial judges routinely instruct juries every day that counsel's mere questions do not constitute evidence and that they cannot provide an evidentiary basis for any inference. Only answers are evidence. In this case the only evidence forming a basis for such an assumption is found in the improperly admitted hearsay answers furnished by Agent Rigolizzo.

For these reasons I would reverse and remand the case for a new trial.

APPENDIX D
ALBERGO'S PETITION TO COURT OF APPEALS FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1279

PHILIP ALBERGO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING PURSUANT TO RULE 40 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

The Petitioner, (Defendant-Appellant), Philip Albergo, hereby respectfully petitions for a rehearing of the above entitled appeal decided on June 17, 1976, affirming a judgment entered in the United States District Court for the Eastern District of New York, Orrin G. Judd, Judge, following a jury verdict convicting defendant of a single count of perjury in violation of 18 U.S.C. Section 1623(a).

The Petitioner, Philip Albergo petitions for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure. Petitioner respectfully submits that, the Court

overlooked an important point in Appellant's argument for reversal; to wit, that the Trial Court failed to charge the jury that they could not consider the tapes of intercepted telephone conversations, introduced into evidence by the Government, unless they first determined the identity of the male voice, which was a disputed issue of fact to be determined by the jury. (See Appellant's Brief, pages 29-30). Since the Government's entire proof was based on the intercepted taped telephone conversations, the jury should not have been permitted to consider the tapes introduced into evidence unless the jury first found that the male voice on said tapes belonged to the Petitioner.

The opinion handed down by this Court in the case at Bar twice refers to the Rule that identification of Petitioner's voice is the responsibility of the jury (Slip opinion, pages 4216-17). The Trial Judge's attention was specifically directed to the fact that the identity of the male voice was a disputed issue of fact (T50-51) and a request for a charge on this issue was duly made (T232-33). *See* Appellant's Brief, page 30. However, the Trial Court failed to give any charge whatsoever on this element, thereby removing this major issue of fact from the jury. At the very best, the Court below failed "to charge the correct law expressly and thereby relie(d) upon the jury's ability to infer it." Such conduct was proscribed by this Court in *United States v. DiDonato*, 301 F. 2d 383, 385 (2d Cir. 1962). (Appellant's Brief, page 30).

As a matter of fact, the Trial Judge's charge was phrased in such a manner that the jury would tend to assume that the Court had already determined that the male voice on the intercepted telephone conversations, was that of the Petitioner and the entire question of voice identification was for all intents and purposes removed from the jury's consideration. (T217-220), despite the law to the contrary.

It is respectfully submitted that reversible error was committed because of the Trial Judge's failure to give any charge whatsoever on a critical issue which this Court concedes was a matter for the jury to determine. Since this question was not considered in the opinion of this Court, it is respectfully requested that a rehearing be granted.

Dated: Brooklyn, New York
June 30, 1976

s/George S. Meissner
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APPENDIX E
ORDER OF COURT OF APPEALS DENYING PETITION FOR REHEARING

ORDER DATED AUGUST 18, 1976

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of August, one thousand nine hundred and seventy-six.

Present:
HON. J. JOSEPH SMITH,
HON. WALTER R. MANSFIELD, CJ
HON. ELLSWORTH A. VAN GRAAFEILAND

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

PHILIP ALBERGO,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant, Philip Albergo

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk